No. 80-775

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CONCETTA CIAFFONI, ET AL., *Petitioners*

v.

ELIZABETH COWDEN, ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' COUNTER-STATEMENT OF THE CASE

This matter involves a challenge to the validity of the Last Will and Testament of Paul Ciaffoni, who died on September 23, 1974, residing in Washington County, Pennsylvania. The decedent's Will was admitted to probate by the Washington County Register of Wills on November 25, 1974. Appeals from the decision to admit the Will to probate were filed by two of the decedent's seven children and by his widow. The appeals alleged that the Will was a forgery in that pages had been substituted after the Will had been signed.

At the trial of the will contest, the contestants offered to introduce, *inter alia*, three items of evidence in support of their forgery claim. First, they offered the testimony of an alleged expert in linguistic styles. This witness would have testified that he had compared the decedent's Will to approximately fifty other wills believed to have been written by the lawyer who wrote the decedent's Will. He also would have testified that there were differences in the language used, including the use or non-use of certain words and phrases, to cause him to believe that the decedent's Will had been written by someone other than the lawyer who claimed to have written it.

The proffered testimony was refused because it could not be established that linguistic analysis techniques had any validity whatever when the technique consisted of identifying particular words or phrases, such as the use of "I give, bequeath and devise", compared to "I give", in a will. Furthermore, whatever the validity of linguistic analysis might be in identifying the author of a creative work, such as a novel, there was no evidence that it had ever been used in identifying the author of a legal document. Such documents are based upon the requirements of the law, legal form books and prior versions of the same document[1] as well as upon the draftsman's intellect and imagination.

The second item of evidence offered by the contestants, and refused by the trial court, was testimony of an alleged expert in typing characteristics. He claimed to have compared thirty-nine "typing elements" in the decedent's Will with those elements in approximately fifty other wills supposedly written by the same lawyer and typed by the same secretary. "Typing elements" are

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1. The decedent's Will had been prepared by revising an earlier will, which was itself a revision of a still earlier will which had been drafted by a different lawyer having no association with the lawyer who wrote the probated will.

items which allegedly characterize the style of a particular typist. They include, for example, width of margins, spacing and paragraphing, the presence or absence of underscoring where blank spaces (such as date) are to be filled in, and the presence or absence of a typed name below a signature line.

This proffered testimony was also refused. First, it could not be established that the same typist had typed all of the fifty or so comparison wills. Second, there was no evidence that there was any scientific support for the technique in general, or for the thirty-nine "typing elements" selected by the proposed witness as his standards for comparison.

The third item of proffered evidence was the result of a test performed on the decedent's Will by the inventor of an "electrostatic detection apparatus" ("ESDA"). This machine was alleged to be capable of measuring and revealing very slight indentations in paper surfaces, such as those which occur on sheets of paper placed beneath a sheet on which writing is being done. The proposed witness would have testified that the indentations on the backer to the decedent's Will did not correspond precisely to the handwritten date and the signatures of the decedent and the witnesses on the last page of the will. The reason for the discrepancy was that the last page of the will had moved slightly compared to the backer as the various handwritten items were being placed on it. There was, however, no evidence to suggest why the paper had moved. The contestants contended that the will had not been stapled or bound together when it was executed (thereby making the alleged subsequent substitution of pages possible), but it was equally likely that the page had shifted slightly as the signers' hands rested on it.

The trial court rejected this proffered testimony because the ESDA had never achieved scientific acceptance in the United States, and even if it had done so, no

conclusions relevant to the issues could be drawn from the test results.

The contestants also attempted to introduce evidence of oral statements of the testator and one of his daughters, which statements allegedly contradicted the provisions in the Will. These offers were refused in accordance with the applicable Pennsylvania rules of evidence.

The trial court upheld the validity of the decedent's Will, and the contestants appealed to the Pennsylvania Supreme Court. The issue before the Supreme Court was the correctness of the various evidentiary rulings described above. The Supreme Court affirmed the trial court *per curiam*, with one Justice dissenting and one not participating. A subsequent application for reargument in the Supreme Court was denied.

REASONS WHY THE WRIT SHOULD BE DENIED

The pending Petition seeks to obtain this Court's review of a state court decision pertaining only to the admissibility of evidence under state decisional law. No federal question whatever, much less a substantial one, can be found in this case, nor was any federal question presented to the Pennsylvania Supreme Court. Accordingly, there is no jurisdiction under 28 U.S.C. §1257 (3) for this Court to grant certiorari.

A grant of certiorari is permissible only when two conditions exist. First, the case must present a substantial federal question. *E.g., Durley v. Mayo*, 351 U.S. 277, 76 S.Ct. 806, 100 L.Ed. 1178 (1956), *rehearing denied*, 352 U.S. 859, 77 S.Ct. 22, 1 L.Ed. 2d 69; *Southwestern Bell Telephone Co. v. State of Oklahoma*, 303 U.S. 206, 58 S.Ct. 528, 82 L.Ed. 751 (1938). Second, the federal question must have been properly raised and considered in the state court proceedings. *E.g., Louisville etc. N. R. Co. v. Woodford*, 234 U.S. 46, 34 S.Ct. 739, 58 L.Ed. 1202 (1914); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 23 S.Ct. 375, 47 L.Ed. 480 (1903). This court has consistently held that it cannot and will not decide federal constitutional questions which are first presented when a review of the state court decision is being sought. *E.g., Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed. 2d 398 (1969); *Edelman v. People of State of California*, 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387 (1953). Neither condition has been fulfilled in this case.

The Questions Presented for Review, as set forth in the Petition for Certiorari, assert that the refusal of the trial court to admit certain testimony into evidence constitutes a denial of due process of law under the Fifth and Fourteenth Amendments to the United States Constitution. After making the assertion, however, the Petitioners fail to offer either argument or authority for the proposition that the trial court's purely evidentiary rulings violated any constitutional rights. The entire ar-

gument of the Petitioners is that there have been erroneous evidentiary rulings in the trial court. On this basis alone, it is clear that the jurisdictional requirement of a substantial federal question has not been met, and for this reason the Petition should be denied.

Even if this Court believes that a substantial federal question is contained in the Petition, or can be fairly inferred from the questions presented therein, that federal question was never presented either to the trial court or the Pennsylvania Supreme Court. The Petitioners have not cited any point in the trial or appellate record where the existence of a federal question was presented or suggested. They cannot do so because no such point exists. No reference to or asserted reliance upon any federal law or constitutional provision was ever made during the trial or appeal of this case. The questions presented to the Pennsylvania Supreme Court are solely evidentiary questions. Indeed, even the dissenting opinion by Mr. Justice Roberts in the Pennsylvania Supreme Court (reproduced at A3 of the Petition for Writ of Certiorari) deals only with the admissibility of the proffered but rejected testimony. The opinion does not mention in even the most tangential manner the existence of any federal question in this case. It is clear that if any federal question exists in this case, it has not been presented to the state courts as uniformly required by the decisions of this Court.

Since neither of the two prerequisites for the issuance of a Writ of Certiorari by this Court are present in this case, the Petition must be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 1980, three copies of Respondents' Brief in Opposition were mailed by First Class Mail to Theodore E. Breault, Esq., 1000 Lawyers Building, Pittsburgh, PA 15219. I further certify that all parties required to be served have been served.

Mark E. Goldberg